IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, Petitioner, FEDERAL ENERGY REGULATORY COMMISSION, and UNITED STATES OF AMERICA, Respondents.	)	Case No. 17-1271 (Consolidated with Case Nos.18-1002 and 18-1006)

On Petition for Review of Order of the Federal Energy Regulatory Commission, 161 FERC ¶ 61,043 (October 13, 2017)

[ORAL ARGUMENT NOT SCHEDULED]

BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE REPLY TO OPPOSITIONS FILED BY RESPONSDENT AND MOUNTAIN VALLEY PIPELINE TO MOTION FOR STAY AND ALL WRITS ACT PETITION
[CORRECTED]

INTRODUCTION

Petitioner Blue Ridge Environmental Defense League ("BREDL") hereby replies to the oppositions filed by Respondent Federal Energy Regulatory Commission ("FERC") and Intervening Respondent Mountain Valley Pipeline ("MVP") to the request by Petitioners BREDL and Appalachian Voices *et al.* for a

stay pending appeal of the FERC Certificate authorizing pipeline construction challenged herein.

ARGUMENT

I. Petitioners Are Likely to Succeed on the Merits of their NHPA Claims.

A. This Court's Limited Decision in *City of Grapevine* Provides No Precedent for the Broad Disregard of the NHPA's Plain Statutory Language and Purpose Sought Here by FERC.

Neither MVP nor FERC attempt to argue that FERC completed its responsibilities to take into account the effects of the pipeline on historic properties "prior to" the issuance of the Certificate, notwithstanding the plain language of Section 106 of the National Historic Preservation Act ("NHPA"), 54 U.S.C. § 306108. Moreover, as MVP acknowledges, the mandated Section 106 reviews are ongoing, with no specific completion date in sight. MVP Response, at 25. Nonetheless, citing *City of Grapevine v. FAA*, 17 F.3d 1502 (D.C. Cir.), *cert. denied*, 513 U.S. 1043 (1994), FERC and MVP argue that it is enough that the Certificate include Environmental Condition No. 15, which purports to restrict pipeline construction within historic areas until the completion of the various evaluations, treatment plans and consultations concerning historic properties have taken place.

However, the *City of Grapevine* case represents a limited, fact-specific exception to this clear statutory language of Section 106 prohibiting agency

approvals "prior to" the issuance of any license or the approval of the expenditure of any funds. In the *City of Grapevine* case, this Court held that the conditional approval by the Federal Aviation Administration ("FAA") of an airport expansion project proposed by the Dallas-Fort Worth Airport Authority did not violate Section 106 where the FAA ensured that Section 106 compliance occurred prior to the expenditure of funds for the project, and where the potential impacts on historic properties were not as a result of construction of the runway, but were in the form of noise impacts from aircrafts flying over noise-sensitive historic areas – impacts that would only occur upon the operation of the runway.

Moreover, the proposed action in *City of Grapevine* involved the construction of two new runways: "Runway 16/34 East, scheduled to be operational in 1992, and proposed new Runway 16/34 West, scheduled to be operational in 1997." *Id.* at 1504. Only the West Runway --- the runway whose construction would not take place for five years – was subject to the FAA's conditional approval due to its potential impacts on historic properties, and the FAA specifically "conditioned final approval of the West Runway upon its subsequent reevaluation." *Id.* at 1508.

As a result, the FAA's conditional approval did not foreclose the FAA's ability to consider measures to avoid and minimize adverse impacts prior to construction of the West Runway – a key component of Section 106 – since the

FAA retained the authority to deny the airport the right to actually use the runway based on the results of the Section 106 process. As the Court explained, the only consequence of this conditional approval was the project applicant's "risk of losing its investment should the § 106 process later turn up a significant adverse effect and the FAA withdraw its approval." *Id.* at 1509.

The limited circumstances of the FAA's approval in *Grapevine* are not present in this case. To the contrary, this case represents precisely the context in which the statutory purpose of this mandatory language of the statute, which is also emphasized in the binding Section 106 regulations, will be undermined by allowing the applicant to move forward with construction of a project prior to the completion of Section 106. In this case, construction of the pipeline itself is the action that will result in irreparable injury to the hundreds of acres of rural historic districts, including contributing natural features such as trees and historic roadways, that will be clear-cut and bulldozed by MVP to construct the pipeline. [1] Here, unlike the *City of Grapevine*, both MVP and FERC admit that FERC intends to continue to authorize piecemeal construction without any comprehensive

[1] Indeed, MVP's representative responsible for construction has conceded that "once MVP starts construction in these areas, these rural historic district areas, they will. . . change these areas irreparably." Transcript dated Jan. 12, 2018, in *MVP v. Easements, et al.*, Case No. 17-cv-492 (W.D. Va.) (hereinafter referred to as "Transcript"), at p. 244 (excerpt attached hereto as Exhibit A).

reevaluation upon completion of the required Section 106 reviews and consultations. FERC Response, at 25, MVP Response, at 25.

MVP asserts that "[i]f FERC finds that Mountain Valley has not complied with the terms of the Programmatic Agreement, it is within FERC's power to withhold approval to start construction of the *affected portions* of the Project pursuant to the agreement and Environmental Condition No. 15." MVP Response, at 25 (emphasis added). However, even if construction through these historic districts is temporarily deferred while "treatment plans" are prepared, these plans can give no meaningful consideration to measures to avoid adverse effects. "The completed segments would stand like 'gun barrels pointing into the heartland' of the [historic districts] .... and then presenting the responsible federal agency with a fait accompli." *Maryland Conservation Council v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986) (quoting *Named Individual Members of San Antonio Conservation Soc'y v. Texas Hwy. Dep't*, 400 U.S. 968, 971 (1970) (Black, J., dissenting from denial of certiorari)) (cited by this Court in *Karst Environmental Educ. & Protection, Inc. v. E.P.A.*, 475 F.3d 1291 (D.C. Cir. 2007)). It is precisely this sort of influence on federal decision-making that the NHPA's clear statutory language – which FERC asks this Court to ignore – is designed to prevent.

For that reason, other courts, in factual contexts similar to this one, have held that such conditional approvals violate the clear language and statutory

purpose of Section 106. Significantly, neither FERC nor MVP make any effort to distinguish this case from the factually on-point case of *Mid-States Coalition for Progress v. STB*, 345 F.3d 520, 554 (8th Cir. 2003), where the Court unequivocally held that the plain language of the NHPA barred the Surface Transportation Board ("STB") from conditionally approving the construction of a new railroad corridor because no Programmatic Agreement was in place prior to the issuance of the requested license.

In sum, the *City of Grapevine* case represents a limited, fact-specific exception that this Court took pains to reconcile with the clear statutory language of Section 106 prohibiting agency approvals "prior to" the issuance of any license or the approval of the expenditure of any funds. FERC and MVP seek to expand this limited exception into a general rule that any time an agency has the authority under its organic statute to condition its approval – an administrative power that most if not all licensing agencies possess – the agency may ignore the clear statutory command that the Section 106 review must be completed "prior to" the issuance of "any license." 54 U.S.C. § 306108. Indeed, one FERC Commissioner in a recent case expressed grave concern about the propriety of issuing such conditional certificates before environmental and cultural/historic reviews are complete. *See PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053 (2018) (Glick, Comm'r, dissenting). This Court should reject FERC's attempt to convert

a narrow exception into a broadly applicable ruling that eviscerates the plain language and purpose of Section 106 of the NHPA.

2. FERC Cannot Cure Its Plain Violation of Section 106 By Signing A Programmatic Agreement After-the-Fact.

MVP and FERC suggest that FERC's signing of a Programmatic Agreement ("PA") with the Advisory Council on Historic Preservation ("ACHP") following the issuance of the Certificate somehow cures this clear violation of Section 106. However, this view fails to recognize that the signing of the Certificate itself forecloses the ability of FERC and consulting parties to perform a key aspect of the statutorily-mandated review set forth in the binding Section 106 regulations – to consider whether there are "alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties," in consultation with the [State Historic Preservation Officer ("SHPO")] . . . and other consulting parties." 36 C.F.R. § 800.6(a)(1).

Such foreclosure is self-evident from the recent actions of MVP and FERC, who have clearly used the issuance of the Certificate as *carte blanche* to ignore impacts to the rural historic districts, initiate eminent domain proceedings, and rush through the development of meaningless "treatment plans." As MVP's construction manager has conceded, MVP "can't vary" its "approved route." *See* Transcript, at p. 253.

Consistent with this limitation on the ability to avoid or reduce harm to historic properties at this late juncture, the recent "treatment plan" proposed by MVP to address adverse effects to the rural historic districts identified in Virginia proposes only to document identified resources that will be destroyed by the pipeline. *See* ACHP Letter to FERC (Jan. 18, 2018) (attached hereto as Exhibit B). As the ACHP plainly told FERC, "Many of the consulting parties and stakeholders have indicated that they find the proposed treatments to be minimal as they fail to appropriately resolve adverse effects. The ACHP agrees with this conclusion since the actions proposed in the draft Mountain Valley treatment plans will not adequately mitigate the project adverse effects on the historic districts, contributing properties, setting and context." *Id.*

The Courts have confirmed the ACHP's view here that the preparation of such "document-and-destroy" mitigation does *not* satisfy FERC's obligation under the Section 106 regulations to resolve adverse effects by considering measures to "avoid, minimize, or mitigate" them. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 809 (9th Cir. 1999) ("*documenting* the [historic] trail did not satisfy the Forest Service's obligations to minimize the adverse effect of transferring the intact portions of the trail") (emphasis added). These and other post-Certificate actions make clear that there can now be no meaningful mitigation of the pipeline's impacts on historic properties.

Moreover, contrary to MVP's view, the signing of the PA does *not* represent "completion of the Section 106 process." Unlike a Memorandum of Agreement, a PA does *not* resolve adverse effects or even fully identify them, but merely adopts a process for completing those required reviews in the future. MVP cites no authority other than *City of Grapevine* in support of its bald assertion, and the *City of Grapevine* case did not involve a situation in which a PA was contemplated. Rather, the Section 106 regulations make clear that a PA is an alternative mechanism that is appropriate for limited circumstances, not present here, such as where the "identification of historic properties," or the assessment of adverse effects, cannot be completed until "specific aspects or locations of an alternative are refined or access is gained." 36 C.F.R. § 800.4(b)(2); *see id.* § 800.14(b)(1)(ii). Here, by contrast, consultations with the Virginia SHPO that took place prior to the issuance of the Certificate, resulted in the assessment of adverse effects on numerous rural historic districts that had already been identified. There were no practical reasons why the consideration of measures to "avoid, minimize, or mitigate" these adverse effects, as required by the Section 106 regulations, should have been deferred, other than to accommodate MVP's desire to proceed with construction.

Both MVP and FERC completely ignore the recent court decision cited in BREDL's stay motion holding that "merely entering into a Programmatic

Agreement does not satisfy Section 106's consultation requirements." *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F. Supp. 2d 1104, 1109 (S.D. Cal. 2010) (rejecting the agency's assertion that "the execution of a PA completes the Section 106 process"). As that Court further pointed out, the Section 106 regulations contemplate the use of a PA to permit only a "temporary delay in consultation" over the "identification of historic properties" until "specific aspects or locations of an alternative are refined or access is gained." *Id.* at 1111 (citing 36 C.F.R. § § 800.4(b)(2)). As the Court recognized, the Section 106 process is completed upon actual "*compliance* with the procedures established in an approved PA." *Id.*

Nor is MVP's assertion correct that "FERC and Mountain Valley conducted a robust Section 106 consultation process" prior to the issuance of the Certificate. MVP Response, at 24. In fact, FERC engaged in no "consultation" to resolve adverse effects whatsoever.[2] In particular, no efforts were made to consider measures to "avoid, minimize, or mitigate" adverse effects prior to the issuance of the certificate. Although Section 106, as MVP points out, does not require the adoption of any *specific* mitigation measure, the required consideration and

[2] "*Consultation* means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process." 36 C.F.R. § 800.16(f). Merely soliciting general comments through the environmental review process cannot substitute for the consultations required by Section 106.

consultation to resolve adverse effects is the core purpose of Section 106. FERC's action in issuing the Certificate without engaging in this required consultation undermines the most fundamental and important function of Section 106 – its "action-forcing" purpose. *Cf. Robertson v. Methow Valley Citizens Council*. 490 U.S. 332 (1986).

Accordingly, notwithstanding Environmental Condition No. 15, FERC's issuance of the Certificate prior to the execution of the PA, and *long* before completing the required Section 106 reviews, violates the plain language of Section 106 by depriving the ACHP of an opportunity to comment on measures to resolve adverse effects "prior to" the issuance of any license. 54 U.S.C. § 306108.

II. The Balance of the Equities Requires Issuance of the Stay.

MVP is actively seeking to enter lands in Virginia to remove trees, and has represented that this removal will take place as early as February 1, 2018. [3] As the attached transcript of the condemnation proceedings makes clear, MVP has emphasized the need to promptly undertake tree removal in a continuous fashion for the entirety of the pipeline corridor in Virginia, emphasizing the problems with the need to "skip around" historic areas. *See* Transcript, at p. 151-2 (Exhibit A).

[3] MVP's representative further explained that if MVP cannot secure the necessary state permits to proceed with construction and actual mechanized tree feeling, "we will apply to the FERC for a non-mechanized tree felling plan that will allow us just to cut the trees . . .." Transcript at p. 153-56.

BREDL defers to and incorporates the arguments made in the reply filed by Appalachian Voices to the remainder of equitable arguments advanced by FERC and MVP.

CONCLUSION

For the foregoing reasons, BREDL respectfully requests that the Court stay FERC's Certificate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of FRAP 32(a) and the word limit of FRAP 27(d) because, excluding the parts of the document exempted by FRAP 32(f), this document contains 2547 words.

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Dated: January 26, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2018, I caused to be served the foregoing Reply to Stay Oppositions upon all ECF-registered counsel via the Court's CM/ECF system.

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